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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union at the 13th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to its Appendices

Delegations will find attached document COM(2018) 559 final.

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EUROPEAN
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Brussels, 27.7.2018
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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the 13th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to its Appendices

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf at the 13th session of the General Assembly of the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF), due to take place on 25 and 26 September 2018, as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to its Appendices. The meeting documents are available on the website of OTIF at the following link: http://extranet.otif.org/en/?page_id=1071.

2. CONTEXT OF THE PROPOSAL

2.1. The Convention concerning International Carriage by Rail (COTIF)

The COTIF Convention governs the running of the OTIF, its objectives, attributions, relations with the Member States and its activities in general. There are 46 countries party to the COTIF Convention, including 26 EU Member States, i.e. all except Cyprus and Malta. Since 1st July 2011, the European Union is also a contracting party to the COTIF Convention.

It comprises two parts: the Convention itself and seven Appendices that establish uniform railway law, i.e. technical functional requirements and model contracts for the carriage of passengers and goods (Appendix A: Contract of International Carriage of Passengers by Rail – CIV; Appendix B: Contract of International Carriage of Goods by Rail – CIM; Appendix C: International Carriage of Dangerous Goods by Rail – RID; Appendix D: Contract of use of vehicles in international rail traffic – CUV; Appendix E: Contract of use of infrastructure in international rail traffic – CUI; Appendix F: Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic – APTU; Appendix G: Technical Admission of Railway Material used in International Traffic – ATMF).

2.2. The agreement between the European Union and the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF)

On 16 June 2011, the Council adopted Council Decision 2013/103/EU on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF) on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999. The Agreement entered into force on 1st July 2011. Council Decision 2013/103/EU specifies that the Commission shall represent the Union at OTIF meetings. It also contains a Declaration by the Union concerning the exercise of competence (Annex I) and provides for internal arrangements for the Council, the Member States and the Commission in proceedings under OTIF (Annex III).

2.3. The General Assembly of OTIF

The General Assembly is OTIF's supreme decision-making body. It holds an ordinary session every three years. It can also hold extraordinary sessions. The General Assembly takes decisions on proposals to amend the Convention. Depending on the case, two thirds or half of the Member States must approve the adopted amendments. The last General Assembly took place in September 2015.

The Union and/or its Member States participate in that process in accordance with the procedural arrangements under OTIF, the Rules of Procedure of the General Assembly and the provisions of the Agreement on the Accession of the Union to the COTIF Convention.

There is a quorum in the General Assembly when the majority or two thirds of the OTIF Member States enjoying the right to vote are represented at the time of the vote.

2.4. The envisaged act of the General Assembly of OTIF

On 25 and 26 September 2018, during its 13th session, the General Assembly of OTIF is expected to adopt certain amendments to the COTIF Convention and to its Appendices E (Contract of use of infrastructure in international rail traffic – CUI), G (Technical Admission of Railway Material used in International Traffic – ATMF) as well as to decide on the adoption of a new Appendix H to the COTIF Convention regarding the safe operation of trains in international traffic.

The envisaged act will become binding on the parties in accordance with Articles 33 and 34 of the COTIF Convention, which provide (Article 34) that:

'§ 1 Modifications of the Convention decided upon by the General Assembly shall be notified to the Member States by the Secretary General.

§ 2 Modifications of the Convention itself, decided upon by the General Assembly, shall enter into force for all Member States twelve months after their approval by two-thirds of the Member States with the exception of those which, before the entry into force, have made a declaration in terms that they do not approve such modifications.

§ 3 Modifications of the Appendices to the Convention, decided upon by the General Assembly, shall enter into force for all Member States twelve months after their approval by half of the Member States which have not made a declaration pursuant to Article 42 § 1, first sentence, with the exception of those which, before the entry into force, have made a declaration in terms that they do not approve such modifications and with the exception of those which have made a declaration pursuant to Article 42 § 1, first sentence.'

At its 13th session, the General Assembly will also decide on certain additional issues, e.g. modification of its Rules of Procedure, Election of the Secretary General of OTIF, Election of the members of the Administrative Committee.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

All substantive agenda items to be dealt with at the 13th meeting of the General Assembly of OTIF have been subject to earlier discussion and/or approval at the 26th session of the Revision Committee in February 2018. This is the case in particular for items 10, 12, 13 and 14. Accordingly, where appropriate, the position to be taken on the Union's behalf, and the determination of the exercise of voting rights on behalf of the Union, are based upon and derived from Council Decision (EU) 2018/319¹.

The explanations and justification for the position are summarised below:

Agenda Item 5 – Modification of the Rules of Procedure

The proposed draft amendments to the Rules of Procedure of the General Assembly of OTIF relate to the deadlines for submitting and dispatching documents, the participation of independent experts and clarification of the provisions relating to the exercising of rights by regional organisations. The current version of the Rules of Procedure predates the Union's accession to the COTIF Convention; certain provisions need therefore to be updated, in particular the provisions establishing the quorum and governing the rights to vote of the Union (Articles 20 and 21), which have to be modified in order to comply with Article 38 of the COTIF Convention and with the EU-OTIF Agreement. The other modifications proposed

¹ OJ L 62, 5.3.2018, p. 10.

aim to ensure orderly proceedings of the General Assembly on the basis of the best available international practice and OTIF's practice; they should also be supported.

Agenda Item 8 – Cooperation with international organisations and associations

The proposal from the OTIF Secretariat consists in a decision of the General Assembly authorising the Administrative Committee to be empowered to establish and dissolve consultative contact groups with other international organisations and associations, and to supervise the functioning of such groups. At this stage, the Union shares the objective, namely to allow for a degree of flexibility in the matters concerned. However, it cannot accept the proposal as such, since it amounts to conferring a new task upon the Administrative Committee, beyond those set out in Article 15 § 2 of the COTIF Convention, without formal amendment of the latter, operated in accordance with the applicable procedures.

Therefore the Union should oppose the proposal from the OTIF Secretariat and can instead propose that the General Assembly should establish temporarily an *ad hoc* committee, in accordance with Article 13 § 2 of the Convention, with the task to establish and dissolve consultative contact groups with other international organisations and associations, and to supervise the functioning of such groups. The activities of the Committee should be guided by and in line with OTIF's work programme. In this respect, it is important to bear in mind that such tasks have practical implications for the development of policies at OTIF level in all areas. It is thus necessary to guarantee that the Union is fully involved in these activities, in accordance with Article 5(1) of the Accession Agreement.

A period of four years should be appropriate, so as to judge, prior to its expiration, whether the experience gained is satisfactory. In the affirmative, and following due preparation, an amendment of the Convention could be envisaged for a structural solution, in compliance with the guarantees for the Union established by Article 5(1) of the Accession Agreement.

Agenda Item 10 – Partial revision of the base Convention: amendment of the procedure for revising COTIF

In line with the outcome of the discussion on this topic at the 26th session of the Revision Committee in February 2018, it is necessary and appropriate to support the proposed amendment to the COTIF Convention, in order to provide for a fixed time period (36 months) for the entry into force of amendments to the Appendices adopted by the General Assembly, including the clause of flexibility to extend such a deadline on a case-by-case basis, where so decided by the General Assembly by the majority provided for under Article 14 § 6 of the COTIF Convention. The proposal aims at improving and facilitating the procedure for revising the COTIF Convention with a view to the consistent and rapid implementation of amendments to the Convention and its Appendices, and in order to prevent adverse effects of the current lengthy revision procedure, including the risk of internal misalignment between amendments adopted by the Revision Committee and those adopted by the General Assembly, as well as external misalignment, particularly with Union law.

Agenda Item 12 – Partial revision of the CUI UR

In line with the amendments approved during the 26th session of the Revision Committee in February 2018, it is appropriate to support the modifications of the CUI UR, which aim essentially at clarifying the scope of the CUI UR by introducing a definition in Article 3 of 'international railway traffic' to mean 'traffic which requires the use of an international train path or several successive national train paths situated in at least two States and coordinated by the infrastructure managers concerned', and by amending Article 1 (Scope) accordingly, while keeping the link with CIV and CIM UR. The objective is to ensure that the CUI UR are more systemically applied for their intended purpose, i.e. in international railway traffic. The

draft amendments are consistent with the definitions and provisions of the Union acquis regarding the management of rail infrastructure and the coordination between infrastructure managers (e.g. Articles 40, 43 and 46 of Directive 2012/34/EU² (recast)). As regards the draft amendment proposed to Article 8 (Liability of the manager), this is essentially editorial and does not affect the scope or substance of the provision. The draft amendments proposed to Article 9 as well as to Articles 3, 5, 5bis, 7 and 10 are strictly editorial.

Agenda Item 13 – Partial revision of the ATMF UR

A partial revision of the ATMF UR was adopted at the 26th session of the Revision Committee. This revision however also implied some minor changes of editorial or linguistic nature to Articles 1, 3 and 9 of the ATMF UR, which are outside the competence of the Revision Committee. They should thus be adopted by the General Assembly. The provisions of the ATMF UR are compatible with the provisions of the European Union's Interoperability Directive 2008/57/EC³ and with part of the Safety Directive 2004/49/EC⁴. With the adoption of the fourth railway package in 2016, the Union changed several provisions of this acquis. On the basis of an analysis by the Commission, the OTIF Secretariat and the relevant working group prepared modifications concerning Articles 2, 3a, 5, 6, 7, 10, 10b, 11 and 13 of the ATMF UR. These modifications are necessary in order to harmonise some terminology with the new EU provisions and to take into account some procedural changes in the EU, in particular the fact that the EU Agency for Railways will be competent to issue vehicle authorisations. The basic concept of ATMF is not affected by the proposed changes.

Agenda Item 14 – New Appendix H regarding the safe operation of trains in international traffic

The draft new Appendix H sets out provisions to regulate the safe operation of trains in international traffic with the objective to harmonise the COTIF Convention with the Union's acquis and support interoperability beyond the European Union. The proposed text is in line with the provisions of the new safety Directive (EU) 2016/798⁵ and the related secondary legislation. The proposal to include this new Appendix H should be supported. For this purpose, it is also necessary to modify certain provisions of the COTIF Convention.

The proposed texts are submitted to the General Assembly pursuant to a decision of the 26th session of the Revision Committee and are fully in line with the Union position that was defined ahead of the Revision Committee.

4. LEGAL BASIS

4.1. Procedural legal basis

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing *‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’*

² Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), OJ L 343 14.12.2012, p.32.

³ Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community (Recast) OJ L 191, 18.7.2008, p.1.

⁴ Directive 2004/49/EC of the European parliament and of the council of 29 April 2004 on safety on the Community's railways (...), OJ L 164, 30.4.2004, p.44.

⁵ Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast), OJ L 138, 26.5.2016, p. 102.

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'⁶.

The General Assembly of OTIF is a body set up by an agreement, namely the Convention concerning International Carriage by Rail (COTIF). The acts which the General Assembly of OTIF is called upon to adopt constitute acts having legal effects. The envisaged acts are capable of decisively influencing the content of EU legislation in the area of rail transport.

The envisaged acts do not supplement or amend the institutional framework of the agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

The main objective and content of the envisaged act relate to 'rail transport'.

Therefore, the substantive legal basis of the proposed decision is Article 91 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 91 TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the General Assembly of OTIF will amend the COTIF Convention and some of its Appendices, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

⁶ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Proposal for a

COUNCIL DECISION

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Union has acceded to the Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (the ‘COTIF Convention’), by virtue of Council Decision 2013/103/EU⁷.
- (2) Council Decision 2013/103/EU specifies that the Commission shall represent the Union at the meetings of the Intergovernmental Organisation for International Carriage by Rail (OTIF).
- (3) All Member States, with the exception of Cyprus and Malta, are contracting parties to and apply the COTIF Convention.
- (4) The General Assembly of OTIF was set up in accordance with point (a) of Article 13(1) of the COTIF Convention (‘General Assembly’). At its 13th session due to take place on 25 and 26 September 2018, the General Assembly is expected to decide upon certain amendments to the COTIF Convention as well as to its Appendices E (Contract of use of infrastructure in international rail traffic – CUI) and G (Technical Admission of Railway Material used in International Traffic – ATMF). At this session, the General Assembly is also expected to decide upon the adoption of a new Appendix H to the COTIF Convention regarding the safe operation of trains in international traffic.
- (5) It is appropriate to establish the position to be taken on the Union's behalf at the 13th General Assembly OTIF, as the envisaged amendments to the COTIF Convention and its Appendices will be binding on the Union and capable of decisively influencing the content of Union law, namely Directive (EU) 2016/797 of the European Parliament

⁷ Council Decision 2013/103/EU of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (OJ L 51, 23.2.2013, p. 1).

and of the Council⁸ and Directive (EU) 2016/798 of the European Parliament and of the Council⁹.

- (6) The amendments to the Rules of Procedure of the General Assembly of OTIF aim to update certain provisions as a result of the accession of the Union to the COTIF Convention in 2011, in particular with regard to provisions governing the right to vote of the regional organisation and establishing the quorum.
- (7) The amendments to the COTIF Convention aim to improve and facilitate the procedure for revising the COTIF Convention with a view to the consistent and rapid implementation of amendments to its Appendices thereto, and in order to prevent adverse effects of the current lengthy revision procedure, including the risk of internal misalignment between amendments adopted by the Revision Committee and those adopted by the General Assembly of OTIF, as well as external misalignment, in particular with Union law.
- (8) The amendments to Appendix E (CUI) aim to clarify the scope of application of the CUI Uniform Rules to ensure that those rules are more systemically applied for their intended purpose, i.e. in international railway traffic such as in freight corridors or for international passenger trains.
- (9) The amendments to Appendix G (ATMF) aim to achieve harmonisation between the OTIF rules and the Union rules, in particular after the adoption of the fourth railway package by the Union in 2016.
- (10) Most of the proposed amendments are in line with the law and the strategic objectives of the Union, and should therefore be supported by the Union.
- (11) The position of the Union at the 13th session of the General Assembly of OTIF should therefore be based on the Annex to this Decision,

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be taken on the Union's behalf at the 13th session of the General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) is set out in the Annex.
2. Minor changes to the positions expressed in the Annex of this Decision may be agreed by the representatives of the Union at the General Assembly without further decision of the Council.

Article 2

The decisions of the 13th General Assembly, once adopted, shall be published in the *Official Journal of the European Union*.

⁸ Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union (OJ L 138, 26.5.2016, p. 44).

⁹ Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (OJ L 138, 26.5.2016, p. 102).

Article 3

This Decision is addressed to the Commission and to the Member States.

Done at Brussels,

*For the Council
The President*